

IN THE CIRCUIT COURT OF THE
SIXTH JUDICIAL CIRCUIT IN AND FOR
PINELLAS COUNTY, FLORIDA
CASE NO.: 97-5968-CI-11

	X	
	:	
	:	
JOHN EASTMAN,	:	
	:	
Plaintiff,	:	
	:	
vs.	:	VOLUME XXXIX
	:	
BROWN & WILLIAMSON TOBACCO CORP.,	:	
individually and as successor by	:	
merger to THE AMERICAN TOBACCO	:	
COMPANY, a foreign corporation;	:	
PHILIP MORRIS, INCORPORATED, a	:	
foreign corporation,	:	
	:	
Defendants.	:	

BEFORE:	HONORABLE ANTHONY RONDOLINO
PLACE:	The Judicial Building
	545 First Avenue North
	St. Petersburg, Florida
DATE:	Wednesday, April 2, 2003
TIME:	1:00 p.m. - 2:00 p.m.
REPORTED BY:	TONYA H. MAGEE, RPR
	Court Reporter and Notary Public
	Sixth Judicial Circuit

TRIAL PROCEEDINGS

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P R O C E E D I N G S

THE COURT: Welcome back, ladies and gentlemen. At this time, Philip Morris will proceed with their closing remarks.

Mr. Lydon.

MR. LYDON: Thank you, Judge Rondolino, and thank you, ladies and gentlemen of the jury.

I want to step back this way in order that when we're viewing the screen I don't want to be blocking your view.

First I want to thank you for your sense of duty and we are grateful for the time that you extended over the last several weeks to hear the evidence in this case. Hopefully, we worked, as we promised you we would, to expeditiously, effectively, efficiently keep you -- using your time -- excuse me -- to the best possible effect.

Now, you heard a lot in this case about some rather complex subjects, and what I would like to do is take some time at this point to try to assist

21 you in marshalling that evidence and understanding
22 it and assist you toward reaching what we feel the
23 evidence supports and what you can draw from it in
24 terms of basic conclusions.

25 Understanding, of course, this is

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1 Mr. Eastman's case, not anybody else's case. He
2 brought claims that were personal to him. He
3 claims that he has these diseases that have been
4 caused by his cigarette smoking and that this was
5 the fault of the designs of the cigarette
6 companies.

7 Now, the first thing we feel that he has not,
8 as he must, is that he has a cigarette-caused
9 disease. We're going to go into that in more
10 detail. But our position, first and foremost, is
11 that John Eastman does not have a cigarette-caused
12 disease, and specifically, we're talking about both
13 the obstructive lung disease; we're also talking
14 about his abdominal aortic aneurysm.

15 Now I want to tell you that even if he did
16 have a cigarette-caused disease, it would not have
17 been caused by anything that Philip Morris or Brown
18 and Williamson did or didn't do. The third thing I
19 want to tell you is that even if he had a
20 cigarette-caused disease, it would have been caused
21 as a consequence of his whole lifestyle choice to
22 smoke cigarettes, more importantly, to continue to
23 smoke cigarettes and not to quit smoking.

24 Now, there are a few subjects as controversial
25 as cigarettes. If you remember back at the

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1 beginning of the trial, I put these two slides -- I
2 actually put them up one after another in front
3 you. Of course, instead of saying "what did the
4 evidence show," it said "what will the evidence
5 show". But, otherwise, these are the things we
6 said we thought you would find from your review of
7 the evidence in this case.

8 As I said, when you look at this you can see
9 the part where -- I mean when I say there have been
10 a few subjects as controversial as cigarettes. The
11 risks to health from cigarettes have long been
12 known to the ordinary American. We, as a people
13 through our congress, have decided that adults who
14 are aware of the health risks of smoking are free
15 to choose to smoke. That's one of the basic facts
16 that I laid out for you there, and you see it as
17 number three on your right.

18 At the same time, over at least the last 50
19 years to the present, as science and technology has
20 improved and has pointed more specifically to more
21 and more suspected constituents or chemicals in
22 cigarette smoke, Philip Morris and the other
23 manufacturers, including Brown and Williamson, have
24 been working hard to reduce the harm from those
25 products through filtration, through the renovation

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1 and through the other means that were describe by
2 Dr. Lipowicz.

3 Despite what has been done, there is no safe
4 cigarette. There hasn't been a safe cigarette.
5 You heard Dr. Lipowicz say that he didn't know of

6 one that was feasible at this time or imaginable at
7 this time. So when you think about it, there's a
8 great deal of common sense in this that's inherent
9 in the product itself. You know, the plant leaf,
10 which you're rolling, lighting one end and inhaling
11 the other.

12 That smoke from a common sense prospective
13 wouldn't be a healthy thing to do, but as time has
14 gone on we've learned more and more about what
15 actually is in the smoke, and the companies have
16 been working to try to reduce it. Even that last
17 product that you heard Dr. Lipowicz describe, the
18 Accord, it couldn't get rid of all of the
19 benzo(a)pyrene.

20 Mr. Acosta pointed out that benzo(a)pyrene is
21 something people had been aware of for quite a
22 while. True enough. But even when you burn the
23 tobacco, there's some amount of benzo(a)pyrene
24 that's drawn from the smoke generated from the
25 heated cigarette.

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1 That's the point, I guess, with number three
2 on the other side. There is no safer cigarette
3 which Philip Morris or Brown and Williamson could
4 have made that John Eastman would have smoked. And
5 again, understand, we're talking about lighted
6 cigarette. We're talking about something that you
7 smoke, not something that you don't smoke. We're
8 not talking about a nicotine inhaler.

9 For as long as John Eastman has been smoking a
10 Philip Morris product, beginning with Marlboro near
11 or around 1960, there's been no evidence of any
12 document, any ad or anything anybody wrote that
13 gave John Eastman any assurance that he was doing
14 anything more than choosing to continue to risk his
15 health for the benefit of the immediate pleasure
16 and the satisfaction that he got from cigarette
17 smoking. That's an adult choice that he was
18 entitled to make.

19 Point number one, John Eastman was aware of
20 the health risks of smoking. Indeed, they were
21 common knowledge. His own words say it best. You
22 heard them already this morning, but I'm going to
23 repeat them for you here again today. It wasn't
24 for long or -- excuse me, not long after 1960,
25 somewhere around 1960 or 1961 that he had that that

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1 testicle removed and received radiation treatment.

2 And at that time, he describes -- maybe it was
3 in the room where he was receiving radiation
4 treatment -- maybe he was leaving a physician's
5 office -- but he describe as he looks back on his
6 life, re-examined his lifestyle and decided what he
7 was going to do about something, like smoking or
8 drinking.

9 This is taken from his testimony in the course
10 of a deposition and what you can see is we pulled
11 certain portions of these pages. I'll read it
12 again.

13 Question: "I think what you're saying so to
14 me is, with this last statement, this says sometime
15 in connection with the your orchiectomy, which is
16 the testicle removal, you begin to ponder what

17 you've been hearing and considering in light of
18 your own mortality that you now had brought to the
19 fore as a result of your cancer diagnoses?
20 Right.
21 Then perhaps you should stop and take stock of
22 what you have been refuting up to that point or
23 denying up to that point."
24 His answer: "No. Specifically, that there
25 was -- that there were -- was there any life chose
4267
1 or habit or substance abuse or personality trait or
2 other that I was doing that I proposed to myself
3 not to do periodically, and I didn't include
4 tobacco as something that I wished not to do or
5 could not do or would not do. I just said I'm
6 going to smoke, I'm going on smoking. I'm going to
7 take a drink when I want to, and I'm going to
8 continue in my profession and I'm going to try to
9 have a positive feeling about life and I am going
10 to beat this thing."
11 Now, that's a rational decision that he made.
12 There was nothing -- you know, he wasn't at fault
13 in any way in making that decision. That's a
14 choice that he made. That's how he decided he
15 wanted to live his life, and he was entitled to do
16 that.
17 He also knew at or about that time that
18 cigarette smoking was linked to serious disease,
19 like lung cancer and respiratory disease. In that
20 respect, again, I'll refer you to what he
21 acknowledged when he was first deposed and asked
22 questions about the lawsuit that he had brought.
23 Question: "The disease that you associated
24 with smoking, not necessarily believing that you
25 were going to get them?"
4268
1 Use your common sense and believe that he
2 believed he wasn't going to get them.
3 "But that you associated with smoking your
4 lung cancer and emphysema, right?
5 No. I associated smoking with respiratory
6 disease, of which I was not able to enunciate the
7 type or kinds, as I am today.
8 But you knew about lung cancer, though?"
9 His answer: "I knew lung cancer and
10 respiratory disease."
11 Now, it doesn't get much more serious in terms
12 of diseases than lung cancer. So, my point is,
13 that at the time that he took stock, that he
14 decided how he was going to live his life, he
15 decided that despite knowing about lung cancer and
16 respiratory disease, that he was going to go on
17 living and doing as he had. He was going to smoke
18 because he wanted to smoke.
19 So, if smoking did indeed medically cause the
20 diseases he claims, those diseases were legally
21 caused by his own free choice, his own exercise of
22 freewill. His decision as to how he was going to
23 live. On the other hand, based on the evidence in
24 this case, it is very, very doubtful -- and bear in
25 mind that we don't have the burden of proof -- but
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1 it is very, very doubtful that smoking cigarettes

2 caused John Eastman's COPD or abdominal aortic
3 aneurysm.
4 Remember the slide --
5 Could we have number one again, please.
6 Remember slide number one. I told you this at
7 the very beginning, "Cigarette smoking causes
8 cancer, aneurysms, emphysema and other forms of
9 chronic obstructive pulmonary disease. We stand by
10 that that's a basic fact." That's true. But to
11 say that that is true does not mean that it causes
12 aneurysms or COPD or emphysema in every instance.
13 Indeed in this instance, our suggestion is
14 that the evidence would point to other causes. Of
15 course other causes exist, and you heard that from
16 the witness stand from virtually every medical
17 expert. They talked about these diseases in terms
18 of risk factors. But more importantly, when we got
19 down to the evidence in this case and what the
20 experts had to say in this case, it makes it much
21 more probable that the COPD that John Eastman had
22 was caused by a severe lung infection that
23 devastated him in late May 1995.
24 Could we look at number four, please?
25 Remember this? This was an exhibit that was
4270
1 used with both Dr. Goldman and Dr. Goldstein. And
2 it's particularly significant that prior to 1995 --
3 and they were in agreement on this. Prior to 1995,
4 both Dr. Goldman and Dr. Goldstein could point to
5 no complaint, no documented shortness of breath, no
6 signs of respiratory disease before May of 1995
7 when he had that illness.
8 The oximetry, which was alluded to this
9 morning, we can talk about that in a little more
10 depth, but that's the test to determine how much
11 oxygen was in his blood. Dr. Goldstein -- first of
12 all, Dr. Goldman didn't come up with that during
13 the cross-examination on Friday. It was only on
14 redirect on Monday that he came up with the
15 possibility that in June of '94, when his ribs were
16 broken, that somehow he had low levels of oxygen.
17 You heard Dr. Goldstein explain that little
18 figure pretty clearly. What he told you was that,
19 first of all, the broken ribs no doubt bruised his
20 lungs. That in and of itself would reduce the
21 ability of the lungs to exchange oxygen. He also
22 told you that because of the bruised ribs,
23 naturally it would be more difficult for an
24 individual to inhale or to exhale, and as a
25 consequence, that would reduce the amount of
4271
1 oxygen.
2 More importantly than the both of those, he
3 didn't find that 90 number as being particularly
4 abnormal or unusual, and as he pointed out, it was
5 altogether consistent with someone who had broken
6 ribs. Except for that one point there's
7 absolutely nothing that anybody could point to,
8 either Dr. Goldstein or Dr. Goldman with respect to
9 what occurred prior to May of 1995.
10 And we could go through the evidence, but I'm
11 sure you remember, knee fracture, anesthesia in
12 '83, no complaints of shortness of breath.

13 Likewise, in 1988 when he had anesthesia again with
14 the penile implant, no complaints of shortness of
15 breath. There were no complaints of shortness of
16 breath in December of 1994, six months -- not even
17 six months prior to the onset his illness.

18 And as Dr. Goldstein made clear, with respect
19 to those rib fractures, it's just inconceivable
20 that if Mr. Eastman had a progressive disease,
21 something like emphysema that was due to his
22 cigarette smoking, that it wouldn't have shown up
23 before 1995, that it wouldn't have shown up, in
24 particular, in June of 1994, when he broke those
25 ribs.

4272

1 If we could look at -- Dr. Goldman,
2 plaintiff's witness, was examined on this subject,
3 and he agreed that typically or usually he'll -- he
4 also went on to say in fairness to their --
5 instances where it occurs outside of this region as
6 well, but what he said was usually about
7 emphysema --

8 THE COURT: What is that? We're getting some
9 feedback.

10 MR. LYDON: In any event, going back to this
11 exhibit, which you'll remember was the subject of
12 cross-examination of Dr. Goldman, plaintiff's
13 pulmonology expert, he acknowledged that it was
14 usual for the symptoms of emphysema to show up in
15 susceptible smokers between 30 and 35 years after
16 they became regular smokers.

17 We know, from the testimony in this case, that
18 Mr. Eastman began as a smoker sometime prior to
19 1946. I believe his testimony was that it was
20 somewhere around 1944. He may have in fact
21 admitted earlier than age 16. But, certainly by
22 the time 1946 to 1948 came around, when he was in
23 college at Iowa State, he was a pack-a-day smoker.

24 Now, if you just follow what Dr. Goldman
25 said -- what Dr. Goldstein said about the usual

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1 onset of this illness from the time a susceptible
2 smoker begins smoking until the time when he starts
3 showing symptoms, that takes us no further than
4 1983. Yet, in 1983, we know from the previous
5 slide you saw when he went in for the knee surgery,
6 he had no symptoms. He had no symptoms in '87. He
7 had no symptoms in '88. He had no symptoms in
8 1994.

9 If we look at number six. This was also
10 something that we talked about with Dr. Goldman,
11 and he had to concede this, as well. The first
12 complaint of shortness of breath was in May of
13 1995. That's 48 years after the man started to
14 smoke. That's much later than when a susceptible
15 smoker usually shows symptoms of emphysema, if it's
16 caused by cigarette smoking.

17 And so, to begin with, we've got this unusual
18 circumstance of the timing of these symptoms. We
19 have the unusual circumstance of the presentation,
20 that is to say, nothing before this sudden illness.

21 There is no doubt about the fact that the man
22 was very, very sick in May of 1995. You heard some
23 discussion of Terry Legatti this morning in how he

24 was blue when she took him to the hospital. He
25 reported at the time he was admitted in June of 4274

1 1995, having had 103 fever, the nausea, the
2 vomiting headaches. The man was very, very ill.
3 That's not COPD. That's a severe lung infection.
4 And what did Dr. Goldman, on
5 cross-examination, say about that? It took a bit
6 of work with him to finally acknowledge it, but,
7 indeed, he did acknowledge it.
8 If we could have page 2644, please.
9 This was his testimony beginning on line nine.
10 "But the answer that was given in the past is that
11 it could be severe diffuse viral pneumonia?"
12 Answer: I think rarely if you have diffuse
13 severe viral pneumonia or diffusely severe abnormal
14 x-ray that it can lead to this."
15 In other words, what he is acknowledging is
16 that indeed there are severe lung infections that
17 can in fact trigger something like emphysema.
18 "Would it make any difference whether it was
19 viral or bacterial?"
20 He goes on: "Well, I think that certain
21 bacterial infections, like tuberculosis, which is
22 bacterial, it can certainly do that.
23 So that any really severe, overwhelming lung
24 infection that was diffuse could lung emphysema
25 then, right?

4275

1 Well, as I think you can see here, if you had
2 diffuse infection on the chest x-ray, I think
3 that's certainly possible."
4 Now, notice, he uses this weasel word-, but
5 when he's trying to slide off of his testimony with
6 references to the chest x-ray, "ignore the chest
7 x-ray." He told you and Dr. Goldstein told you,
8 you can't disease emphysema on a chest x-ray. What
9 I'm going to suggest to you is that his testimony,
10 and I am talking about Dr. Goldman at this point in
11 time, concedes the possibility of this being an
12 infection that triggered the emphysema.
13 And again, think back on how this disease
14 grows. You should also look back to Dr. Goldstein,
15 because Dr. Goldstein came in and testified --
16 May we have 3432, please.
17 This was in defense presentation of evidence,
18 and he is the pulmonologist. But Dr. Goldman asked
19 his opinion specifically about what he thinks was
20 the cause of the obstructive lung disease that
21 Mr. Eastman has had since 1995. That question at
22 the top.
23 "Doctor, in your opinion, what was the most
24 important factor to a reasonable degree of medical
25 probability that caused the obstructive lung

4276

1 disease that Mr. Eastman has had since 1995?"
2 The answer: "I feel, based on the information
3 that we discussed, the most in fact" -- excuse
4 me -- "important factor was this respiratory
5 infection in 1995".
6 So -- could we look at seven, please.
7 This is what Dr. Goldstein also pointed out,
8 other factors that you should consider in whether

9 smoking was the cause of this severe COPD.
10 "Amongst smokers, four or five smokers never
11 develop clinically significant COPD." By the way,
12 on this point, Dr. Goldman agreed with
13 Dr. Goldstein. Again, just as we were taking about
14 usual onset, these guys were pretty close to
15 agreement on everything, except that ultimate,
16 ultimate question.
17 "As to non-smokers, many people who never
18 smoke develop COPD."
19 Finally, "in COPD cases, nine out of ten COPD
20 cases are not pure emphysema." What is the
21 significance of that? Well, it lends its support
22 that there are other causes here that are at work
23 and that in this instance, the opinion that
24 Dr. Goldstein gave was a correct one, the more
25 probably one.

4277

1 If we look at the next line, which is slide 8.
2 What does Dr. Goldstein say? This is a brief
3 overview of his opinions. First of all, no
4 evidence that Mr. Eastman had COPD prior to his
5 1995 respiratory infection. And other than the
6 oximetry reading, Dr. Goldman didn't dispute that.
7 Number two, "Mr. Eastman's 1995 severe
8 respiratory infection was the most important factor
9 in his obstructive lung disease." We know what's
10 that based upon. This is Dr. Goldstein's opinion a
11 few short seconds or a minute ago. And we also
12 know and that Dr. Goldman had to give a lot of
13 ground on that.
14 Number three, "Quitting smoking sooner, would
15 have reduced any possible risk of developing COPD
16 related to smoking?" I will be talking about the
17 benefits of quitting a little later, but that's a
18 brief overview of what Dr. Goldstein had to say.
19 And we're going to talk about the benefits of
20 quitting. And the benefits of quitting address
21 this situation if you were to find, and that's a
22 big "if", that this smoking was the probable cause
23 or a significant contributing factor to this COPD.
24 The next slide, which is nine.
25 This one looks very much like the first slide

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1 I told that you I raised with Dr. Goldman on
2 cross-examination. You see the difference is what
3 is concluded as we go to the right side of that
4 date in June of 1995. And this, again, is another
5 way of viewing the differences between
6 Dr. Goldstein and Dr. Goldman. It also shows you
7 how close they are, because it's only after June of
8 1995 that he has this severe shortness of breath.
9 It's the result of two-week history of illness. It
10 was serious enough that he had to be hospitalized,
11 and he was there for ten days. And he needed this
12 intensive treatment.
13 Now, that picture, I suggest to you, makes it
14 more probable that Mr. Eastman's medical condition,
15 the reasons we're talking about COPD was not caused
16 by cigarette smoking, it was caused by that severe
17 infection.
18 The evidence in this case also makes it more
19 probable that his abdominal aortic aneurysm was

20 caused not by cigarette smoking, but by the
21 radiation treatment that he received in the early
22 1960s. In fact you could almost say with respect
23 to the abdominal aortic aneurysm, it's even
24 stronger because at least as to that dispute, not
25 being caused by smoking, there really wasn't much
4279

1 evidence offered by the plaintiff.
2 They didn't offer much more than we told you
3 in the beginning when we agreed that cigarette
4 smoking causes aneurysms. When I said to you it
5 doesn't cause them in every instance, it suggested
6 to you it wasn't caused in this instance. This is
7 very much -- this abdominal aortic aneurysm is very
8 much an example of that kind of situation.

9 Could we look at slide ten, please.
10 These are the findings that Dr. Garrett,
11 actually, espoused. First of all -- and I believe
12 doctor Dr. Schwade was in agreement on that.
13 "Mr. Eastman's abdominal CT scan" -- remember, we
14 spent some time during the past several days
15 looking at that slide -- "reveals striking findings
16 that demonstrate a radiation injury. Dr. Schwade
17 pointed out to you that radiation can, indeed,
18 cause this kind of injury to tissue.

19 Mr. Eastman's unusual abdominal aortic
20 aneurysm involves the entire length of his aorta
21 and is within the field of radiation. Both
22 Dr. Schwade and Dr. Garrett found that very
23 significant. We will look at another slide on
24 that. But you remember what they said about how
25 unusual this was, that it extended the entire
4280

1 length of that abdominal aorta from the point where
2 it left the diaphragm up to where the aorta
3 divides.

4 The other interesting observation made by
5 Dr. Garrett and, interestingly, one that's
6 supported by Dr. Back, is that Mr. Eastman's
7 medical records contain no evidence of any
8 significant vascular changes outside the field of
9 radiation. Now, if cigarette smoking were the
10 cause of these changes, they would have expected
11 and you should expect to find from the medical
12 records evidence of vascular changes outside of
13 that region that the got radiation. There really
14 wasn't any contrary evidence on this point.

15 If we could move to 11.

16 This makes the point of what I was talking
17 about typical. If you remember, Dr. Garrett has
18 looked at thousands of these. Obviously, an expert
19 who knows what he is talking about, who has spent
20 years in this field, teaches in it, who has seen
21 more aneurysms, certainly, than Dr. Back, who said
22 that it was most unusual, that the typical
23 aneurysm -- and he knew all of the reasons why,
24 because of the things that people suspected, at
25 least, as the reasons, the decreased small veins in
4281

1 the vaso vasorum, in this area of the aorta.
2 Mr. Eastman's was most unusual, is most unusual, in
3 that it extends all the way from the diaphragm down
4 to that port.

5 Let's look at number 12, if we can.
6 This is something that Dr. Schwade and
7 Dr. Garrett were in agreement on. The findings,
8 these abnormal findings were consistent with a
9 radiation injury. The abnormal findings were
10 exactly in the field of irradiation.
11 The reason we brought Dr. Schwade in is that
12 he did know about radiation, he is a radiation
13 oncologist. He knows what the standard of care was
14 back in the early 1960s. He knows how patients
15 were treated. He described the fields of
16 radiation. He agreed that these abnormal findings
17 were within what had been the irradiated field. He
18 explained that this was in the early days of
19 radiation. Are the abnormal findings limited to
20 the field of irradiation? Yes, he said that as
21 well.
22 The abnormal findings limited to the field of
23 radiation, what does that refer to? That goes back
24 to the slide just previous.
25 If we could go back one more a minute.

4282

1 This one. It's the same thing in the way of
2 saying that his medical records contained no
3 evidence of significant vascular changes outside
4 the field of radiation.
5 And can we go forward again.
6 That's in some sense or another saying that
7 the abnormal findings are limited to the field of
8 irradiation.
9 Now, what was the testimony they heard on this
10 subject? Dr. Back pointed out, he acknowledged --
11 Perhaps, if we can put this on the screen,
12 perhaps not, since it's down.
13 I tell you what I'm going to read this to you.
14 He was asked about by Ms. Faggianelli:
15 "I would like to ask you a couple questions
16 about the effects of irradiation, the radiation of
17 on vessels. Do you have any background and
18 training with respect to the effects of irradiation
19 on vessels?"
20 His answer is: "I have no knowledge of it. I
21 have not done any specific research myself."
22 So when Dr. Back says that he is unaware of
23 any connection between radiation and this kind of
24 injury, all he's really saying is he has no
25 experience with it and, no. Importantly, as I

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1 indicated to you before, Dr. Back does -- he also
2 confirmed that there was extensive calcification in
3 the wall of the aorta. Remember that? That was
4 described to you when Dr. Garrett walked through
5 this and pointed out how the complete circumference
6 of aorta was calcified and how unusual that was;
7 how he had never seen anything quite like it.
8 If we could go to page 3698, first, and line
9 12.
10 We asked for his opinion.
11 "Doctor, do you have an opinion that you could
12 state within a reasonable degree of medical
13 probability about what caused Mr. Eastman's
14 aneurysm?"
15 His answer is yes.

16 "and what is that opinion?"
17 His answer: "I believe that it is more likely
18 than not, certainly, and I feel very confident,
19 that his aneurysm is caused in his unique case --
20 because every patient is different and no patient
21 is the same, and usually you can't even guess the
22 possible cause of the aneurysm in a given patient.
23 But in this case, this unique case, I believe it
24 was due to his radiation therapy that he received
25 when he was a young man for testicular cancer."

4284

1 Now, another significant thing about, since
2 we're on the subject of abdominal aortic aneurysms,
3 is what Dr. Garrett had to say about the relative
4 risk factors, that is to say, what are the most
5 important factors in considering whether someone
6 has -- as to what caused his abdominal aortic
7 aneurysm. And remember, he talked about heredity
8 being number one.

9 He allowed that cigarette smoking was a risk
10 factor to an abdominal aortic aneurysm too. But I
11 want to remind you that he said that was much, much
12 less than, say, heredity as a factor. But most
13 importantly is what I just pointed you to, his
14 testimony, his opinion is unequivocal. He had,
15 really, you might say no doubt about what he
16 thought caused this aneurysm.

17 If we could go to 3722.

18 He was asked this question: "Doctor in the
19 thousands of CAT scans that you have looked at, how
20 many aneurysms have you seen that are like
21 Mr. Eastman's?

22 That are like his?

23 Yes."

24 Answer: "None."

25 First of all, thousands that he has examined,

4285

1 none like this one.

2 Question: "And why did you -- what sets his
3 apart from all of the others?

4 The appearance of the calcification of the
5 artery wall is so unique. There are aneurysms that
6 can have roughly the same distribution that are
7 most unusual, but I have seen those. But not with
8 that appearance that we saw on the CAT scan."

9 And you remember what he was talking about was
10 how the calcification went all the way around the
11 artery, the entire circumference of the artery.

12 Can we go to line 21.

13 And the third basis for his opinion. He says,
14 "Well, it's that he has no evidence of significant
15 atherosclerotic change or aneurysm development
16 anywhere else. His exams have shown normal pulses.
17 He has no complaints to indicate that he has
18 blocked arteries anywhere. The testing of his
19 heart was also okay. His neck arteries seem to be
20 okay."

21 That goes to the point that Dr. Back had to
22 concede. There's no signs of any other problem
23 outside of that area. And so what I can say to you
24 with respect to the abdominal aortic aneurysm is
25 that there's just no evidence to support that

4286

1 claim, that it was caused by his cigarette smoking.
2 And, of course, if cigarette smoking was not
3 the medical cause of either John Eastman's
4 abdominal aortic aneurysm or his COPD, then you
5 don't even have to address the other issues of
6 whether those diseases were legally caused by his
7 own lifestyle choice. You can proceed to check
8 "no" on the boxes of that verdict form that
9 Mr. Acosta showed you this morning, because you
10 don't have even have to get to these other legal
11 issues. If it wasn't medically caused, that's the
12 end of the case.

13 Now, I want to go back to the point of legal
14 cause that we've been talking about, and the cause
15 being Mr. Eastman's lifestyle choices. Our
16 position is that what he did was absolutely
17 perfectly 100 percent reasonable and rational on
18 his part. We're not claiming that he was at fault
19 in any way whatsoever.

20 Congress has already spoken. As I said to you
21 in the beginning of the case and as I pointed out
22 to you in the beginning of my remarks this
23 afternoon, adults are aware of the risk of smoking,
24 they are free to choose to smoke and free to
25 continue to smoke. And so we're still asking you

4287

1 no check no on that verdict form because
2 John Eastman had a choice, he exercised his choice,
3 and live is fill with choices. Some people eat too
4 much fatty food, some drink too much alcohol, but
5 you don't hurt someone because you've been
6 drinking. The consequences are your own; they're
7 the result of your own choses. That's the way we
8 life live here in America.

9 Mr. Eastman claims our product, cigarettes,
10 are defectively designed. How? What's the
11 evidence? They're cigarettes. Tobacco, wrapped in
12 paper, that people smoke. There's been no evidence
13 that anyone knows how to take out the harmful
14 constituents of smoke so that a cigarette is safer
15 when smoked. There have been a lot of very smart
16 people working on this subject for a long, long
17 time and nobody has come up with an answer yet.

18 They know how to reduce constituents. They've
19 come out with products that try to address this,
20 that reduce the amount of smoke that people get.
21 But ultimately, it's a matter of choosing to smoke
22 the cigarette you want.

23 What Dr. Farrone, the ex-Philip Morris
24 employee, who was fired, showed you as a proposed
25 design was no cigarette at all. You can't smoke it

4288

1 because it has a barrier between what he calls a
2 filter and the rod of tobacco. How you light it is
3 an interesting question. What you do with it or
4 why you would light it under the circumstances
5 makes no sense. As Dr. Lipowicz noted, it's a
6 nicotine delivery device; it's not a cigarette.
7 It's a trick. It is not a cigarette.

8 And Dr. Farrone never said, in the course of
9 his testimony, that with a cigarette that you can
10 smoke, that the harmful constituents can be removed
11 from the smoke. He didn't say that. Instead, what

12 have he came up with is this design, which as I
13 suggest to you, really isn't a cigarette at all.
14 And the fact that somebody at some other company
15 may have been looking at this a few years back
16 means absolutely nothing. So what if they're
17 looking at it. I'm sure there are many people that
18 come up with ideas for products, but that product
19 that I'm pointing out is not a cigarette.
20 Dr. Farrone talked about flue-cured tobacco,
21 and the argument somehow this morning, I think,
22 involves a gross understanding -- a
23 misunderstanding of what flue-curing is all about
24 to begin with. The problem that Dr. Lipowicz
25 pointed out, that has been recently discovered, is

4289

1 not that the tobacco is being flue-cured. They
2 might still be calling it flue-cured, but it wasn't
3 been being flue-cured at all; there was no flue.
4 That's what they discovered.

5 You remember how he was describing that when
6 they discovered what the problems was, that these
7 propane heaters that they were using, which
8 everybody thought were fine and clean to burn --
9 you could burn them indoors and people don't suffer
10 any consequences -- the problem was that somehow
11 they were causing this chemical reaction with the
12 tobacco. And so, how did that happen? Well,
13 apparently it happened back when they stopped using
14 flues, as it were, in the '70s when they had the
15 energy crisis and began using these propane heaters
16 as opposed to some other form of heat to cure the
17 tobacco. But that's -- talk about red Herring
18 arguments, that is a red Herring.

19 Now that it was discovered, and as soon as
20 it's been discovered, you see what the companies
21 have been doing, they're going out and equipping
22 these barns with the appropriate kinds of flues and
23 heaters.

24 Mr. Eastman claims we failed to warn him of
25 the health risks of smoking. Well, I want to

4290

1 suggest to you that all of the facts in this
2 evidence are that at all times that he smoked
3 Philip Morris products, he already knew the danger
4 of the serious disease from cigarette smoking. He
5 didn't need any warning. You find that and you can
6 recall it throughout the evidence from virtually
7 all of the witnesses that you heard from.

8 He also chose not to quit, and that's
9 important considering all of this evidence. Even
10 if you want to accept the argument that
11 John Eastman was one of those susceptible smokers
12 for COPD, and that smoking rather than the
13 infection caused his 1995 COPD.

14 The evidence is also clear that quitting as
15 late as 1985 or any time in the '80s or -- and, of
16 course, that's a bit extreme -- would have saved
17 him enough lung capacity to live out the rest of
18 his life. Now, why do I say that? And again, I'm
19 going to go back to what Dr. Goldman said and what
20 Dr. Goldstein said, because, again, we find that
21 both of these pulmonology experts were pretty close
22 with respect to what they had to say about COPD and

23 smoking.
24 They both said that the normal person loses
25 the lung function. Dr. Goldman says in the 4291

1 beginning of the 30ccs, you begin to lose lung
2 function. Remember this chart that was shown, I
3 believe, in Dr. Goldman's testimony. He didn't
4 have any quarrel with it. It's the normal decline
5 in lung function occurs in smokers and non-smokers
6 alike. But if you're a susceptible smoker, one
7 who's likely to get emphysema, you lose at a faster
8 rate.

9 In any event, what they both agreed upon was
10 that as people age, they lose about 30ccs a year.
11 Both men testified to that effect. They also
12 testified that the susceptible smoker loses lung
13 function at a rate of 100 to 120ccs a year, or
14 three to four times as fast as you would if you
15 quit smoking. They also agree that if a
16 susceptible smoker who's losing at the rate of
17 100ccs a year quits smoking, he goes back to that
18 30ccs a year and only loses at the rate of 30ccs a
19 year.

20 Now, Dr. Goldman said we could do the
21 calculations ourself on this, and so I have.
22 If we look at number 14.
23 Again, this summarizes what I just told you.
24 Both of those physicians, both pulmonology experts
25 agree on the loss that a normal nonsmoker has. 4292

1 Both agree that a susceptible smoker loses at the
2 rate of 100 to 120. Goldman said, "You can
3 calculate this on your own, the fact if he quit."
4 Now go to the next slide.
5 All right. We did some calculations. Let's
6 assume that he had quit in 1985. You know, in 1985
7 they put a warning on the package of cigarettes
8 that said, "Cigarettes cause emphysema". That's
9 one of those rotating warnings that you remember we
10 looked at earlier. Okay. He didn't quit in 1985.
11 We know that. That's if he was one of these
12 susceptible smokers, using the conservative loss of
13 the 100ccs, not the 120, the higher number, he'd
14 come out with 1,000ccs that he used up between 1985
15 and 1995, when he quit.

16 How long would it have taken to lose that same
17 1,000ccs if he were only losing them at the rate of
18 30ccs a year? You follow? In other words, if he
19 had quit smoking in 1985 and he were one of these
20 susceptible smokers, he would no longer be losing
21 at the rate of 100ccs a year; he'd lose at 30ccs a
22 year. Well, we did the math. Divide 1,000ccs by
23 30ccs and you come up with 33 years.

24 The conclusion is obvious: That if he quit
25 smoking in 1985, it would have taken him 33 years, 4293

1 or until 2018, and he'd be 90 years old, for his
2 lung function to decline by that same 1,000ccs.
3 That's if he is one of those susceptible smokers.
4 Let's move, if we can, to the next slide.
5 And this just illustrates what I just told
6 you.
7 Can we go to the next one, please?

8 What if he had quit in 1987? That's when he
9 went to see Dr. Stein who encouraged him to quit.
10 And in a moment or two I will go over what he told
11 Dr. Stein and how he reacted to Dr. Stein's advice
12 to quit.

13 Again, using the same calculations if he had
14 quit. Eight years of 100ccs a year is 800ccs. How
15 long would it take him to lose 800ccs if he had
16 have been a quitter losing at 30ccs a year? Well,
17 here we are, 26 years. Again, extent it out. If
18 Mr. Eastman had quit smoking in 1987, it would have
19 taken him 26 years, or until 2013, for his lung
20 function to decline by that very same amount of
21 800ccs.

22 That 2013, he'd be 85 years old. And, as I
23 said to you, in both instances, in '85 or as late
24 as '87, his lungs would have lasted his normal
25 expected life longevity.

4294

1 Life is filled with choices and consequences.
2 Instead of quitting in 1987, we have Mr. Eastman's
3 trial testimony about how he reacted to Dr. Stein
4 urging him to quit smoking. And this was in 1987.

5 Can we look at 19, please.

6 This was in the course of I think my
7 cross-examination of him.

8 Question: "Do you remember in 1987 saying
9 that that thoughts didn't cross your mind, that you
10 weren't interested in quitting smoking?"

11 His answer: "Probably said that, too.

12 That wasn't your attitude, right, to quit?"

13 Answer: "I probably said that, too.

14 Is it that you weren't in the mood to quit?"

15 Answer: "Said that, too."

16 Now, again, life is filled with choices. His
17 was a reasonable choice. It was a choice that he
18 was entitled to make. Nothing prevented
19 John Eastman from quitting his smoking habit. As I
20 told you in the opening and showed you the slide
21 earlier, he was no so addicted to smoking that he
22 had no ability to quit. What it really comes down
23 to it is he didn't really make a good faith effort.

24 Dr. Kaplan was on the stand yesterday and he
25 told you "quitting takes motivation and

4295

1 commitment." I think he said that more than once
2 during the course of his testimony. "Motivation
3 and commitment".

4 When he had that board out, he made it
5 somewhat clear, too. Remember the board showing
6 the brain, and he talked about the fact that we as
7 human beings have a frontal lobe to our brains.
8 The frontal lobe to the brain helps to you control
9 your behavior, it gives you the ability to control
10 your behavior and your pleasure seeking. Things
11 such as, should I drink, should I smoke, should I
12 have sex, all are pleasures that are apparently
13 rooted in the middle part of the brain. But your
14 frontal lobe, as he explained to you, sends
15 messages back saying, no, this is appropriate or I
16 should quit doing this or I shouldn't do this.

17 You have to work at things, though, and we
18 know that and you know that. You're going to be

19 evaluating this case based on your common sense.
20 And all of you have had to do things at times that
21 you found difficult to do or hard to do that you
22 had to work at. Life is filled with choices. Life
23 is filled with responsibilities. Life is filled
24 with difficult tasks at times. You have to work at
25 quitting if what you want.

4296

1 Dr. Kaplan referred to the Smoke Enders
2 episode, as Mr. Eastman described it during his
3 deposition, and he showed you, through
4 Mr. Eastman's own words, that Smoke Enders episode
5 was not a genuine quit effort. First of all, it
6 wasn't Mr. Eastman's idea to quit smoking. I mean,
7 to call it a quit effort is -- well, he didn't say
8 I had to quit smoking to go to Smoke Enders.
9 Rather, this was a situation where Smoke Enders was
10 offering him money to advertise their product. So,
11 perhaps, he wasn't really motivated, but certainly
12 he didn't want to quit smoking at that time and he
13 chose to continue smoking.

14 Can we look at 22, please?

15 This is the testimony that Mr. Eastman offered
16 in that respect. This was Mr. Eastman's statement.

17 Question -- and by the way, we're talking not
18 only about Smoke Enders. The questions goes to
19 quitting all together.

20 "How long have you known that that some people
21 have great difficulty in quitting smoking?"

22 Answer: "I have always known it.

23 When did you first decide you were having
24 great difficulty in quitting smoking?

25 I never tried to quit smoking. I was hired to

4297

1 quit smoking once by Smoke Enders.

2 And I take it that's the first time you have
3 ever attempted to quit smoking?

4 Yes. Yes, it was.

5 And the reason you did it then was as part of
6 a promotional?

7 Yes.

8 How much did they pay you?

9 Oh, I don't know. Hundreds of dollars. I had
10 to surrender and give them their money.

11 But how long did you --

12 I tried for about a week, and I lied for
13 another week. I lied the whole time, as a matter of
14 fact. So I quit" --

15 And he's talking about quitting the Smoke
16 Enders.

17 -- "out of a choice I badly made all my life
18 between hypocrisy and money.

19 Question: "Okay. Who was the head of
20 Smokers; do you remember?

21 No.

22 Who approached you about it?

23 A salesman whose name I don't recall" -- or

24 "don't know." Excuse me.

25 Can we go to the next one?

4298

1 "And would you tell your listening audience
2 that now you're taking, hey, I'm trying Smoke Enders?

3 Yes.

4 It's really working, it's great stuff?
5 Yes.
6 But you weren't really telling them the truth?
7 No."
8 Apparently indicating that he was smoking.
9 "Would you be smoking at the same time you
10 were using this Smoke Enders?
11 If it were the opportunity were there, yes.
12 But the problem was, people outside were looking in the
13 window laughing at me."
14 Well, to call this is a quit effort, it's just
15 not the truth. That's not a quit effort when he's not
16 quitting at all. He's smoking -- what he's really doing
17 is smoking while he's using this Smoke Enders.
18 Question: "Because they would see you smoking
19 and talking?"
20 Answer: "I was a fraud. I was a fraud. They
21 knew it. I said this is it. This can't be. I quit
22 Smoke Enders."
23 We go to the next slide.
24 "Were you actually committed to quitting
25 smoking using Smoke Enders at this point?"

4299

1 We already know the answer to this, he knows
2 the answer to this. His answer is: "No, I can't say I
3 was.
4 Did you ever attempt to quit smoking again
5 prior to your diagnoses for COPD?
6 No."
7 Well, again quitting takes motivation,
8 quitting takes commitment. It's something you have to
9 work at, and no one has suggested at any point that this
10 is something that you can pick up or walk away from
11 easily. That's something we told you in the beginning
12 of the trial. What we said to you that he was never so
13 addicted to smoking that he couldn't quit; he just
14 didn't make a genuine effort. I suggest to you that's
15 what the evidence shows in the case.
16 I only address you once, as you realize. And
17 because the burden of proof is the plaintiffs to prove
18 all of the claims that he has in the case, he's going to
19 have the opportunity to address you again. And I just
20 ask to you bear in mind and then reflect back on the
21 evidence when you hear what he has to say in rebuttal to
22 what I have said. If it's something that you didn't
23 hear me address in the course of my remarks, it's
24 because there's been a lot of ground we've covered over
25 the last several weeks, and I ask you to reflect back.

4300

1 You've been great about taking notes and paying
2 attention. Think on the evidence. As the judge told
3 you, what we lawyers have to say to you isn't evidence
4 anyway. I hope it's been helpful to you in helping you
5 understand what our position is and what it is we think
6 the evidence has shown.
7 Eventually and ultimately it's up to you
8 people to decide whether the plaintiff has proved what
9 his claims is. Our position is that he has utterly
10 failed to prove his claims. He's not proved that his
11 diseases were caused by cigarette smoking. He's not
12 proved that failure to warn of the dangers of smoking
13 caused any disease. He's not proven that there's
14 anything in his tobacco he smoked that was not a natural

15 hazard, a natural thing that's in tobacco.
16 This discussion about ingredients.
17 Dr. Lipowicz indicated in his testimony that the
18 ingredients are tested. There's no testimony from
19 anybody that suggests that cigarettes have some
20 ingredients in them that are more hazardous than the
21 cigarette to begin with. The problem is the tobacco.
22 The problem isn't any flavoring that might be added to
23 the cigarette. And the companies have done what they
24 can, as I told you in the beginning, to reduce the harm,
25 but the cigarette is tobacco. It's burning plant. It
4301

1 produces smoke. There are hazards to smoking.
2 He's not proven that either company was
3 negligent not warning about the dangers. He already
4 knew the dangers. And he's not proven that our product
5 is inherently unsafe in terms of its design. It's
6 inherently unsafe by virtue of what it is, a cigarette.
7 For all of those reasons we ask you not to
8 award him any of the money that he's claiming in this
9 case. Again, he doesn't have disease caused by smoking.
10 And even if you were to find that he has a disease
11 caused by smoking, it's purely a matter of his choice to
12 smoke, to continue to smoke and not to quit before 1995
13 when he did.

14 Thank you very much.

15 THE COURT: We're going to take a five minute
16 comfort break to get set up for the next folks.

17 THEREUPON, the trial continued sine die.
18
19
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22
23
24
25

4302

1 REPORTER'S TRIAL CERTIFICATE
2 STATE OF FLORIDA)
3 COUNTY OF PINELLAS)
4

5 I, TONYA HORNSBY-MAGEE, Registered Professional
6 Reporter, certify that I was authorized to and did
7 stenographically report the trial of the foregoing
8 proceedings; and that the transcript is a true and
9 complete record of my stenographic notes.
10

11 I FURTHER CERTIFY that I am not a relative,
12 employee, attorney, or counsel of any of the parties,
13 nor relative or employee of such attorney or counsel,
14 nor financially interested in the outcome of the
15 foregoing action.
16

17 Dated this 2nd day of April, 2003, at
18 Clearwater, Pinellas County, Florida.
19
20
21
22

TONYA HORNSBY-MAGEE, RPR

23
24

